IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO: 81-6463

ORLANDO ROMERO

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Orlando Romero
Petitioner

BY: NEXT FRIEND

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Orlando Romero petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 4, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reproduced as Appendix "A".

JURISDICTION

The Court's jurisdiction to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254 (1).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

It is respectfully submitted that the writ of certiorari sought by petitioner should be granted for the reasons that the United States Court of Appeals for the Second Circuit failed to afford proper consideration to the issues presented on appeal. Moreover, the Second Circuit continues to adhere to the archaic "farce and mockery" standard when considering claims of ineffective assistance of counsel.

Further, that the Court of Appeals for the Second Circuit in considering violations of the Allen Charge erroneously adheres to the doctrine that: "considering the violation in context of the entire supplemental charge, it does not violate constitutional standards as interpreted in this circuit".

QUESTIONS PRESENTED

I Whether the continuing "farce and mockery" standard adhered to by the Court of Appeals for the Second Circuit deprives petitioner of the rights accrued pursuant to the Fifth and Sixth Amendments to the Constitution of of the United States.

II Whether the District Court erred during it's supplemental charge to the jury by failing to follow the dictates of Allen v. United States, 164 U.S. 492 (1896), and In re: Winship, 397 U.S. 358 (1970).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Relevant Federal Rule of Evidence

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant-

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> (2) persists in refusing to testify concerning the subject matter of his statements despite an order of the court to do so;

A declarnat is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement, for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not

excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, the testimony by direct, cross, or redirect examination.

STATEMENT OF THE CASE

Petitioner is incarcerated at the Federal Correctional Institution, Sandstone, Minnesota 55072. Petitioner was found guilty by a jury for the offense of conspiracy to possess and distribution of cocaine in violation of 21 U.S.C. § § 841 (a)(1) and 846. On October 9, 1981, petitioner was sentenced to eight (8) years imprisonment by the United States District for the Eastern District of New York.

On March 4, 1982, the United States Court of Appeals for the Second Circuit without opinion affirmed the conviction.

This prosecution stems from a warrantless search of a Queens apartment, leased by defendant's brother, Edgar Romero, which uncovered cocaine hydrochloride, processing equipment and United States currency. Edgar Romero, Betty Lemos, Edgar's girlfriend who resided with him in the apartment, and defendant were present during the search and were arrested and subsequently indicted on narcotics charges.

Edgar Romero and Betty Lemos moved to suppress the fruits of the search; appellant's attorney submitted a letter request to take part in the supression motion, but did not submit any formal motion papers. Following a hearing at which Edgar Romero and Betty Lemos testified (appellant did not testify), Judge Constantino granted their motion to suppress and dismissed the indictment.

With respect to appellant, however, Judge Constantino was constrained to deny the motion for lack of standing. Thus, as Judge Platt was later to comment, although the "key people" in the narcotics conspiracy were Edgar Romero and Betty Lemos, appellant had to suffer the brunt of punishment.

At trial before Judge Platt, defendant maintained that the cocaine was not his and that he had nothing to do with the narcotics activity of his brother and his brother's girlfriend. His brother even agreed to so testify, but, after Edgar Romero was warned by Judge Platt of the possibility of re-indictment, defense counsel declined to call him to the witness stand. Nor did defense counsel seek to admit Edgar Romero's vital exculpatory testimony given at the suppression hearing into evidence under F. R. Evid. 803 (b)(1).

Initially, the jury reported a deadlock and Judge Platt gave a strong supplementary charge. A verdict of guilty on both counts of the indictment was later delivered.

THE FACTS

Edgar Romero and Betty Lemos testified at the suppression hearing. Defendant did not.

Edgar Romero and Betty Lemos testified that they resided at Apartment 6M; defendant did not. They claimed that the officers had forced their way into the apartment and that no consent to enter had ever been given.

Edgar Romero confirmed that both the packet of white powder found in the bedroom and the blue flight bag and it's contents were his. His brother, the defendant, did not have custody of the bag and, indeed, the bag had been inside the apartment when they entered that evening.

Betty Lemos testified that Edgar Romero had obtained the currency found in the apartment from the sale of narcotics. Neither she nor Edgar had observed defendant touch the blue flight bag.

Defendant's attorney's "participation" in the suppression hearing consisted of writing letters. He did absolutely no research on the issue of standing despite the Government's rather extensive memorandum on the subject.

Judge Constantino granted the motion as to Edgar Romero and Betty Lemos, finding that while consent had been given to enter, the consent did not encompass the extensive search. With respect to defendant, however, the motion was denied for lack of standing. Although counsel sought "reconsideration," he never seemed to grasp the standing issue.

At trial before Judge Platt, Special Agent Palumbo and Detective Valley again testified, as did Detective Frawley. In essence, their testimony tracked that of the suppression hearing and for the sake of brevity need not be repeated here. It was stipulated that the white powder contained various amounts of cocaine hydrochloride with each exhibit of differing purities.

At first, defense counsel attempted to call Edgar Romero and Betty Lemos as witnesses in the defendant's behalf, counsel advising the court that he had "discussed the matter with their attorney and their attorneys consented to have them testify". Judge Platt, however, "astounded" of the possibility of Edgar confessing to a crime in his attorney's absence, advised Edgar of his constitutional right to decline to testify on the basis of the possibility of self-incrimination. Based upon Judge Platt's admonition to Edgar Romero, counsel declined to call him as a witness.

Defendant, a 39 year old husband and father of one, took the stand in his own defense. He disclaimed ownership of the blue flight bag, which he said was located underneath a chair that he was sitting in, as well, as any involvement in a conspiracy to possess or distribute cocaine. Defendant was a resident alien who had been employed for nine and a half years by the Chicklet (sic) Company.

Following the charge, defense counsel, for the first time, requested a "balancing" instruction with respect to the intest of a defendant. Specifically, counsel requested that Judge Platt advise the jury that the mere fact that the witnesses against the defendant were police officers was not a basis for attaching any greater or lesser weight to their testimony. Judge Platt denied the request as untimely.

Subsequently, a note was received from the jury in which they stated that they were unable to reach a verdict. Judge Platt thereupon gave a supplemental charge in which he admonished the jury that this

> ". . .is not a complex case, as I am sure you realize. . ."
>
> "It is essentially, as I am sure you realize, a question of credibility of the witnesses. . ."
>
> "I realize that you have been deliberating almost as long as the case took to try, but. . .I will tell you again . . ., that this is a question of credibility and common sense, and the application of your common sense to the issues, to the questions."
>
> "There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your common sense and consider the evidence in this case only for the purposes for which it has been admitted and give it a reasonable and fair construction in the light of the natural tendencies and inclinations of human beings."

A verdict was reached the next afternoon.

ARGUMENT

I Whether the continuing "farce and mockery" standard adhered to by the Second Circuit Court of Appeals for the Second Circuit deprives petitioner of the rights accrued pursuant to the Fifth and Sixth Amendments to the Constitution of the United States.

At issue is the application of the "farce and mockery" standard applied to petitioner's claim of ineffective assistance of counsel.

The unpublished opinion of the Court below in affirming petitioner's conviction stated:

> ". . .Similarly, we do not find that counsel's failure to make a motion under Federal Rules of Criminal Procedure 29 amounts to incompetence under this standard. Appellant urges us to change the "farce and mockery" test long employed in this circuit,. . . . .to the "reasonable competence measure adhered to in most other circuits. We are bound by our earlier precedents. . ." (Emphasis Supplied)

"Farce and Mockery" is the key phrase employed by the Court below. Farce is defined as:

> "ridiculous sham";

while mockery is defined as:

> "something absurdly or offensively inadequate".
> (Webster's Unabridged Dictionary)

Petitioner submits that when a respected trial judge accuses defense counsel of being a "fraud", and counsel's subsequent failure to adduce vital exculpatory evidence because of his absolute lack of knowledge of rudimentary evidentiary procedures, which effectively cancelled out petitioner's only defense. Clearly, shows defense counsel's representation to be a ridiculous sham, and offensively inadequate.

In the case of United States v. Bubar, 567 F. 2d 192, 202 (2nd Cir.) cert. denied., 434 U.S. 872 98 S.Ct 217 54 L.Ed. 2d 151 (1977) the Second Circuit indicated it would be willing to re-examine it's position as to the "farce and mockery" standard employed in an appropriate case. Petitioner submits that the instant case is more than appropriate. Moreover, with the exception of the Second and Tenth Circuits all other circuits, have, within the past decade replaced the "sham and mockery" standard with the 'reasonably competent assistance" standard.

Since incompetence confined to one aspect of a case, as it is here, cannot generally be said to render the entire proceeding a "farce and mockery of justice", and since petitioner's claim clearly has merit when considered under the "reasonably competence assistance" rule, petitioner submits that his petition for certioriari should be granted.

An analysis of the farce and mockery standard indicates that it was established in Diggs v. Welch, 80 U.S. APP. D.C. 5, 148 F. 2d 667, cert., denied, 325 U.S. 889, 65 S.Ct. 1576, 89 L.Ed. 2002 (1945). Rickenbacker v. Warden, Auburn Correctional Facility, 550 F. 2d 62, 67 (2nd Cir., 1976) cert., denied, 434 U.S. 826, 98 S.Ct. 104, 54 L.Ed. 2d 85 (1977) (dissenting opinion); Beasley v. United States, 491 F. 2d 687, 693 (6th Cir., 1974). The view of the Diggs court, was that the Sixth Amendment only guaranteed assistance of counsel, not effective assistance. Diggs v. Welch, supra, at 668. Therefore, the court treated the incompetence of counsel claim, as arising under the due process clause's guarantee of a fair trial. Thus, the court held that, to constitute a violation of an accused's right to a fair trial, his counsel's incompetence had to be so gross as to render the proceedings a farce and mockery of justice. Id 80 U.S. App. D. C. at 7, 148 F. 2d at 669.

Surely thirty six (36) years later this view as the basis for ineffective assistance of counsel can no longer withstand anaylsis. See McMann V. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 25 L.Ed 2nd (1970). It is now generally accepted that the Sixth Amendment guarantees the right to effective assistance of counsel. McMann, supra, 397 U.S. at 771 n.14, 90 S.Ct. 1441; United States v. DeCoster, 159, U.S. App. D.C. 326, 331 487 F. 2d 1197, 1202 (1973); United States v. Mayo, 646 F. 2d 369 (9th Cir., 19__).

In McMann v. Richardson, supra, this Court stated that the proper test for measuring competency of counsel's advice, is whether the advice "was within the range of competence demanded of attorneys in criminal cases". The McMann standard has been extended to apply to the Sixth Amendment ineffective assistance claims in general. Marzillo v. Maryland, 561 F. 2d 540, 543, 545 (4th Cir., 1977), cert. denied, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed. 2d 394 (1978)(en banc as to adoption of McMann, standard); Beasley, supra, at 696; DeCoster, supra, at 331 and n.16, 487 F. 2d at 1202 n.16; Moore v. United States, 432 F. 2d 730, 736 n.25 (3rd Cir., 1970) (en banc).

Clearly, the time is ripe for the Second Circuit to abandon the "farce and mockery" standard, as an inapropriate test in determining the merit of ineffective assistance claims.

The "reasonably competent assistance" standard is merely shorthand for the tenet that the quality of a defense counsel's representation should be within the range of competence expected of attorneys in criminal cases. Marzillo, supra, 561, F.2d at 543, 544-45; United States v. Bad Cob, 560 F. 2d 877-880 (8th Cir., 1977); Cooper v. Fitzharris, 551 F. 2d 1162, 1166 (9th Cir., 1977); Hagnard v. Alabama, 550 F. 2d 1019, 1022 (5th Cir., 1977) and Ortiz v. Sielaff, 542 F.2d 377, 379 (7th Cir., 1976).

Under the reasonably competent assistance standard, "effective representation is not the same as errorless representation". Marzillo, supra, 561 F. 2d at 544. Using the "reasonably competent assistance" standard a choice of trial tactics, which appears unwise only in hindsight, does not constitute constitutionally - defficient representation. to sustain a claim under this standard, a defendant must allege and demonstrate that his counsel's error clearly "resulted from neglect or ignorance rather than from informed, professional deliberation". Id at 544.

The case at bar is one in which counsel's performance was so shamefully inadequate that it directly infringed upon petitioner's constitutional guarantee of effective assistance of counsel. Counsel's performance cannot be attributed to a poor choice of trial strategy, but only to inexcusable ignorance, or a senseless disregard of petitioner's rights. United States v. Goodwin, 531 F. 2d 347, 350-352 (6th Cir., 1976); and Marzillo, supra,. Petitioner, realizing that the general proposition that the "decision to call or bypass particular witnesses is peculiarly a question of trial strategy which courts will practically never second-guess". United States ex rel Walker v. Henderson, 492 F. 2d 1311-1314 (2nd Cir.,) cert. denied., 417 U.S. 972 (1974). Submits, however, there are instances in which the failure to call a witness can but be deemed incompetency and former.Judge Frankel so held in United States ex rel Thomas v. Zelker, 332 F. Supp. 595, 600, supra. See, also, Kemp v. Leggett, 635 F. 2d 453 (5th Cir.,(1981); United States v. Easter, 539 F. 2d 663, 666 (8th Cir., 1976).

The present case is one of those circumstances because the failure to call Edgar Romero, and Betty Lemos as well, cannot be justified on the basis of any trial strategy. In fact, the record indicates that counsel intended to do so, but was stymied because the District Court, quite correctly,

advised Edgar of the possibility of self-incrimination.

However, the possibility that Edgar would have asserted the privilege against self-incrimination would not have precluded counsel from adducing his vital exculpatory testimony. Even a rudimentary knowledge of evidentiary principles would have suggested that had Edgar invoked his Fifth Amendment privilege, the testimony given by Edgar at the suppression hearing could have been recived into evidence under the former testimony exception to the hearsay rule set forth in F. R. Evid. 804 (b)(1); cf. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

The use of prior suppression testimony in such instances is well recognized, United States v. Zurosky, 614 F. 2d 779, 792-93 (1st Cir., 1980); United States v. Curry, 471 F. 2d 419, 421 (5th Cir.), cert. denied., 411 U.S. 967 (1973), for use by both the government and the defense. United States v. Thomas, 571 F. 2d 285, 289 (5th Cir., 1978). Not only is the language of F. R. Evid. 804 (b)(1) clear and unambiguous, but hornbooks, such as McCormick, Evidence § § 254-258 (2nd ed.), and standard texts, such as 4 Weinstein's Evidence, pages 804 (a)[01], 804 (b)[01]-[05] and 3 Wharton's Criminal Evidence § § 650-652 (13th ed.), deal at length with the techique. Indeed, more than a cursory reading of Chambers v. Mississippi, 410 U.S. 284, supra, would suggest that the Constitution itself compels the admission of such vital exculpatory evidence, the Federal Rules of Evidence notwithstanding.

Defense counsel had the minutes of the suppression hearing and knew their contents. Moreover, Judge Platt gave counsel ample clues to the possibility of its use by reflecting upon the suppression testimony and the admissions made therein. The failure to present this testimony and the admissions made therein. The failure to present this testimony thus renders counsel's performance constitutionally

"ineffective" because the omission of this evidence "bore no relation, and clearly was not necessary, to implementation of [defense] strategy." United States v. Bosch, 584 F. 2d 1113 1121, 1122 (1st Cir., 1978); see Waltz, Inadequacy of Trial Defense Counsel as a Ground for Post-Conviction Relief in Criminal Cases, 59 Nw. U.L.Rev. 289 (1964).

Other points are deserving of "dishonorable mention." First, after the District Court had completed giving instructions to the jury, counsel made a request to charge that the police officer testimony should not be accorded any greater or lesser weight by virtue of the witnesses's occupation. Such an admonition would have been proper, in the discretion of the court, Bush v. United States, 126 U.S. App. D.C. 174, 375 F. 2d 602, 605 n.6 (1967) (Burger, J.) (approving similar instruction), Golliher v. United States, 362 F. 2d 594, 604 (8th Cir., 1966), and would have balanced the instruction given on the defendant's interest. The request was denied becuase it had not been requested earlier. Given the settled rule in this Circuit that such requests be made before the delivery of the charge, see United States v. Silbergeld, 484 F. Supp. 880, 881 (S.D.N.Y. 1980)(Weinfeld, J.) and authorities cited, counsel's tardiness is proof of his ineffectiveness and lack of diligence. Moreover, counsel did not even request an instruction to the effect that no adverse inference should be drawn from the failure of the defendant to call Edgar Romero and Betty Lemos as witnesses.

The record reveals that despite the suppression hearing counsel still was uncertain as to the scope of the Government's case and was therefore "undecided", until their case was completed, as to whether the defendant would be called as a witness, a matter that drew the ire of Judge Platt. This, coupled with the failure to make the F.R. Criminal Procedure 29 motion, a motion made by Judge Platt and a less than stellar cross-examination clearly indicate a high degree of

incompetence.

In the end, however, it is the failure to adduce the exculpatory testimony that must "shock the conscience" of the court. Failure to be aware of a recent Supreme Court opinion is a serious derelection even in the absence of prejudice, United States v. Murzyn, 631 F. 2d 525, 534, supra, than, a fortiori, when counsel is unaware of elementary rules of evidence and a seminal Supreme Court opinion and this unawareness to destroy the only viable defense, the derelection must be seen as a prima facie infringement of the Constitutional guarantee of effective assistance of counsel. Here, it cannot be said that "counsel's behavior was such that reasonably competent and fairly experienced criminal defense lawyers might find room for debate about its propriety." Finer, Ineffective Assistance of Counsel, 58 Corn.L.Rev. 1077, 1080 (1973). In sum, the Government's case was hardly an overwhelming one, see Indiviglio v. United States, 612 F. 2d 624, 629 n.9 supra; United States v. Katz, 425 F. 2d 928, 930 (2nd Cir., 1970) (counsel's competency must be judged against the strength of Government's case), and the incompetency strikes at the heart of the case. United States ex rel Thomas v. Zelker, 332 F. Supp. 595, supra.

Petitioner submits that trial counsel's shortcomings clearly resulted from neglect, ignorance and general incompetence, rather than from informed, professional deliberation, and thus deprived petitioner Orlando Romero of his Sixth Amendment right to effective assistance of counsel.

Moreover, petitioner submits that to deprive him to the effective assistance of counsel guaranteed by the Sixth Amendment under the "farce and mockery" standard, a standard rejected by an overwhelming majority of the Circuits is to deprive him of due process as guaranteed by the Fifth Amendment. Clearly, due process must be held to mean equal application of the law. A new trial is required to remedy

the constitutional infringments in the instant case.

II Whether the District Court erred during it's supplemental charge to the jury by failing to follow the dictates of Allen v. United States, 164 U.S. 492 (1896) and In re: Winship, 397 U.S. 358 (1970).

Upon receipt of a note from the jury indicating that they were unable to reach a unanimous verdict, the trial judge gave a supplemental charge in which it emphasized that this was "not a complex case", involved "a question of credibility and common sense" and that there was "nothing peculiarly different in the way the jury should consider the evidence in a criminl case from that in which all reasonable persons treat any questions depending upon evidence presented to them".

In the Second Circuit, as contrasted with other Circuits where it is absolutely forbidden, the "propriety of an Allen v. United States, 164 U.S. 492 (1896) - type charge depends on whether it tends to coerce undecided jurors into reaching a verdict by abandoning without reason conscientiously held doubt." United States v. Robinson, 560 F. 2d 507, 517 (2nd Cir., 1977)(en Banc), cert. denied., 435 U.S. 905 (1978); see, also United States v. Corcione, 592 F. 2d 111, 117 (2nd Cir.,), cert. denied., 440 U.S. 975 (1979). Contrast the views of the Third, Seventh and District of Columbia Circuits where the Allen charge has been disapproved. United States v. Fioravanti, 412 F. 2d 407, 420 (3rd Cir.,), cert. denied., 396 U.S. 837 (1969); United States v. Silvern, 484 F. 2d 879, 883 (7th Cir., 1973) (en banc); United States v. Thomas, 449 F. 2d 1177, 1187 (D. C. Cir., 1971), c.f. United States v. Mason, 658 F. 2d 1263 (9th Cir., 1981).

The instruction that there was "nothing particularly different" in analyzing the evidence in a criminal case from

that in which "all reasonable persons treat any question depending upon the evidence presented to them" was erroneous. A criminal case is different; the jury must be convinced of the defendant's guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); id, pp. 369-372 (Harlan, J., concurring). The supplemental instruction could have conveyed the erroneous impression that the Government's burden of persuasion was lessened. Inasmuch as the words "reasonable doubt" were nowhere repeated during the supplemental charge, the error must be deemed prejudicial.

Undue emphasis was placed upon the fact that this was "not a complex case" which involved only "a question of credibility and common sense." Since the initial charge had emphasized defendant's motivation "for false testimony" these statements had the effect of suggesting that the Government's case was more plausible than the defendant's and thereby place pressure of disapprobation on the minority jurors if they cause a mistrial by failing to yield to majority pressure. See United States v. Mason, 658 F. 2d at p. 1267, n.6, supra. In most circuits the mere recitation of these statements would amount to reversible error in and of itself. See, e.g., United States v. Fischer, 531 F. 2d 783, 787 (5th Cir., 1976); United States v. Cisneros, 491 F. 2d 1068 (5th Cir., 1974); Quong Duck v. United States, 293 Fed. 563 (9th Cir., 1923). It is recognized, however, that this Circuit held to the contrary in United States v. Olweiss, 138 F. 2d 798, 800-01 (2nd Cir., 1943), cert. denied., 321 U.S. 744 (1944) (specifically rejecting Quong Duck), close scrutiny of the actual charge and the circumstances in which it was given, as required by the subsequent Supreme Court decision in Jenkins v. United States, 380 U.S. 445, 446 (1965), see, also, United States v. Perisco, 349 F. 2d 6 (2nd Cir.,1965), the instructions must be deemed unduly coercive. See, also, Note, The Allen Charge: Recurring Problems and Recent Developments, 47 N.Y.U.L. Rev.

296, 302 (1972); Note, Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge, 53 Va. L. Rev. 123, 128-29 (1967).

CONCLUSION

By a preponderance of case law petitioner has shown a miscarriage of justice. An innocent man is incarcerated while the admittedly guilty parties of the criminal activity are free. Because defense counsel failed miserably to provide effective assistance of counsel.

The infringement of effective assistance of counsel was compounded by a coercive supplemental charge given when the jury indicated its inability to agree upon a verdict. Moreover, the affirmation is in conflict of "tons" of case law, when the Circuits are in conflict this Court has a duty to bring them in line. Accordingly, petitioner PRAYS this Court reverse the judgment and ORDER a new trial.

Respectfully submitted,

Orlando Romero

BY: NEXT FRIEND

Terrence H. Donahan, Jr.
Post Office Box 1000
Sandstone, Minnesota
55072

March 29, 1982

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of March one thousand nine hundred and eigthy-two.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE ELLSWORTH A. VAN GRAAFEILAND

HONORABLE THOMAS J. MESKILL
Circuit Judges

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES OF AMERICA,

Appellee,

- v. -

81-1447

ORLANDO ROMERO,

Appellant.

81-1447

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Orlando Romero appeals from a judgment of the United States District Court for the Eastern District of New York, Thomas C. Platt, J., convicting him after a jury trial of conspiracy to possess and distribute cocaine hydrochloride and possession, with intent to distribute, of cocaine hydrochloride, in violation of 21 U.S.C. §§ 846 and 841(a)(1) and 18 U.S.C. § 2. The judgment of conviction, which was entered on October 9, 1981, sentenced appellant to two concurrent eight-year terms of imprisonment and a twenty-five year term of special parole. He is presently incarcerated.

On appeal, Romero asks us to reverse his judgment of conviction on the ground that he was denied the effective assistance of counsel. His claim is based primarily on his trial counsel's failure to seek to introduce, under Fed. R. Evid. 804(b)(1), certain testimony given at a suppression hearing. Because there is a real question whether evidence procured at a suppression hearing would be admissible at trial under

these facts, compare United States v. Zurosky, 614 F.2d 779, 793 (1st Cir. 1980), cert. denied, 446 U.S. 967 (1980), with United States v. Wingate, 520 F.2d 309, 316 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976), we cannot say that counsel was incompetent under our standards for his failure to raise this point. Similarly, we do not find that counsel's failure to make a motion under Fed. R. Crim. P. 29 amounts to incompetence under this standard. Appellant urges us to change the "farce and mockery" test long employed in this circuit, see, e.g., United States v. Aulet, 618 F.2d 182, 187 (2d Cir. 1980), to the "reasonable competence" measure adhered to in most other circuits. We are bound by our earlier precedents, which cannot be overruled without an in banc hearing, which seems to us inappropriate in this case.

Appellant also claims that his conviction should be reversed because his rights under Allen v. United States, 164 U.S. 492 (1896), and In re Winship, 397 U.S. 358 (1970), were violated by the supplemental charge given the jury when they indicated that they could not reach a unanimous verdict. While it is not the best practice to tell the jury that "[t]here is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them," when taken in the context of Judge Platt's entire supplemental charge, it does not violate constitutional standards as interpreted in this circuit, see, e.g., United States v. Robinson, 560 F.2d 507, 517 (2d Cir. 1977) (in banc), cert. denied, 435 U.S. 905 (1978).

Wilfred Feinberg,
WILFRED FEINBERG,
Chief Judge.

Thomas J. Meskill,
THOMAS J. MESKILL,
Circuit Judge.

IN THE SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

OCTOBER TERM, 1981

NO: 81-6463

ORLANDO ROMERO

v.

UNITED STATES OF AMERICA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Orlando Romero, respectfully moves the Court for leave to file the attached Petition for Certiorari without prepayment of costs and proceed in forma pauperis pursuant to Rule 53.

The Petitioner supports this Motion with the attached Affidavit of Poverty.

Respectfully submitted,

Orlando Romero
Petitioner Pro Se

BY: NEXT FRIEND

Terrence H. Monahan, Jr.
Post Office Box 1000
Sandstone, Minnesota
55072

March 29, 1982

IN THE SUPREME COURT OF THE UNITED STATES

IN OCTOBER TERM, 1981

ORLANDO ROMERO

v.

UNITED STATES OF AMERICA

A F F I D A V I T

I, ORLANDO ROMERO, being duly sworn, according to law, depose and say in support of my motion to proceed without being required to prepay costs or fees:

(1) I am the petitioner in the above-entitled case, and I am presently in federal custody at the Federal Correctional Institution, Sandstone, Minnesota 55072.

(2) Because of my poverty I am unable to pay the costs of the said cause, nor am I able to give any security for the same.

(3) That I am a pauper within the holding of Adkins v. Dupont, 335 U.S. 331.

(4) I believe that I am entitled to the redress I seek, and the nature of my cause, briefly stated is as follows:

I was convicted in the United States District Court for the Eastern District of New York, of the offense of conspiracy to possess and distribute cocaine in violation of 21 U.S.C. § § 841 (a)(1), and 846 on October 9, 1981. The

United States Court of Appeals for the Second Circuit affirmed the conviction. I am petitioning this Court to reverse my conviction, for the reasons stated in the accompenying Petition.

STATE OF MINNESOTA)
: ss
COUNTY OF PINE)

ORLANDO ROMERO, Affiant

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 31st DAY OF MARCH, 1982.

Deborah J. Diggan

Deborah J. Diggan
NOTARY PUBLIC - MINNESOTA
PINE COUNTY
My commission expires May 23, 1986

No. 81-6463

RECEIVED
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ORLANDO ROMERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JAMES G. LINDSAY
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner was denied effective assistance of counsel at his trial.

2. Whether the supplemental instruction of the trial court after the jury indicated that it could not reach a verdict requires reversal of petitioner's conviction.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-6463

ORLANDO ROMERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1982. The petition for a writ of certiorari was filed on April 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of possessing cocaine hydrochloride with the intent to distribute it and of conspiracy, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to concurrent terms of eight years' imprisonment, to be followed by a special parole term of 25 years on the substantive count. The court of appeals affirmed (Pet. App. 1-2).

1. After their indictment, petitioner, his brother Edgar Romero, and Edgar's girlfriend, Betty Lemos, moved to suppress the evidence seized during a warrantless search of an apartment in New York City. At the suppression hearing, the government called two witnesses, Special Agent Robert Palombo of the Drug Enforcement Administration and Detective Raymond Vallely of the New York City Police Department. Palombo and Vallely testified that they had been sent by their superiors to the apartment to determine whether a Florida state fugitive, Tenorio Pena, was there (S. Tr. 7, 27, 58, 61-62, 82-83, 94, 116, 120, 142).1/ The officers arrived at the building at approximately 6:30 p.m. (S. Tr. 81) and waited by the elevator on the sixth floor for the purpose of observing the fugitive's exit from or entrance into the apartment (S. Tr. 10, 86).

At approximately 7:30 p.m., petitioner, Edgar, Lemos and a child exited from the elevator, and walked past the three officers toward the apartment. Both Palombo and Vallely testified that petitioner carried a blue flight bag on his shoulder (S. Tr. 12, 89-90, 106). As petitioner, Edgar, Lemos and the child were about to enter the apartment, the officers approached them and identified themselves (S. Tr. 13, 30-31, 90, 136). Palombo asked Edgar his name and requested permission to enter (S. Tr. 14). Edgar identified himself and motioned with his hand for the three officers to enter the apartment (S. Tr. 13-14, 93).

Immediately upon entering the apartment, Vallely conducted a security check of the apartment, which disclosed equipment used in processing cocaine and $30,800 in cash (S. Tr. 94-100, 105-107). In response to the agents' request that they be allowed to use the telephone, Lemos escorted Vallely and Palombo into the

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1/ "S. Tr." refers to the transcript of the suppression hearing.

bedroom, where Vallely observed a clear plastic bag containing white powder next to the telephone on the nightstand (S. Tr. 19-20, 101-102). Thereafter, Vallely observed that petitioner, who was seated in the living room, was using his foot to push away the blue flight bag, which was on the floor next to him. The flight bag was seized and found to contain a quantity of white powder wrapped in clear plastic bags (S. Tr. 104-105; see also id. at 25).

Lemos and Edgar testified at the suppression hearing that they lived in the apartment and that petitioner did not reside there (S. Tr. 201, 236-237, 242, 244). Lemos stated that Edgar had obtained the $30,800 from the sale of drugs and had used the equipment to process cocaine (S. Tr. 256-258). Edgar testified that the packet of cocaine on the bedroom nightstand and the equipment belonged to him (S. Tr. 228-230). Edgar also testified that the blue flight bag and the cocaine in it belonged to him, that petitioner had not carried the bag into the apartment or kicked it under the chair, and that the bag was located under the chair even before they entered the apartment (S. Tr. 203-204, 221-222, 231-232). Lemos testified that she had not seen the blue bag until the officers pulled it from under the chair and did not see petitioner carry it into the apartment (S. Tr. 258-259).

The district court, relying upon this Court's decision in Steagald v. United States, 451 U.S. 204 (1981), held that under the circumstances, the attempt to locate the fugitive inside the apartment required a search warrant. Accordingly, the court suppressed, as to Edgar and Lemos, all of the evidence that was seized during the warrantless search. The government did not appeal from this order, and the indictments against Edgar and Lemos were dismissed. However, the court denied petitioner's suppression motion on the ground that he had no legitimate

expectation of privacy in the apartment, the blue flight bag, or the other evidence seized.

2. At petitioner's trial, the government called three witnesses. Palombo and Vallely repeated their suppression hearing testimony that they had observed petitioner carrying the blue flight bag into the apartment (7-27-81 Tr. 23, 45, 55-56).2/ Vallely also testified that petitioner, while seated in the wicker chair in the apartment, had attempted to push the bag away with his foot (7-27-81 Tr. 54).

Another detective testified that from his car, which was parked on the street, he observed petitioner, Edgar, Lemos, and the child enter the apartment building and that "[o]ne of the males was carrying a blue flight bag over his shoulder" (7-27-81 Tr. 84). Later, the same detective observed petitioner inside the apartment "seated in a wicker chair * * * kicking the blue flight bag with his leg as to try and push it behind the chair" (7-27-81 Tr. 86; see also id. at 87).

On the second day of trial, defense counsel informed the court that Edgar was going to take the stand as a defense witness. The court questioned Edgar and ascertained that Edgar did not understand that any self-incriminating testimony he might give at petitioner's trial could form the basis of a new indictment against him. Accordingly, the court refused to allow Edgar to testify unless he first conferred with his attorney concerning his Fifth Amendment rights (7-28-81 Tr. 7-15). Petitioner then took the stand and testified that he did not live in the apartment, that he did not carry the blue flight bag into the apartment, and that the bag had been located beneath the wicker chair (7-28-81 Tr. 20, 22, 23, 26). After petitioner testified,

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2/ It was stipulated that certain exhibits, including the white powder inside the blue flight bag, were cocaine hydrochloride of varying purities (7-27-81 Tr. 101-103).

his attorney decided not to call Edgar to testify (7-28-81 Tr. 48).

3. On appeal, petitioner, represented by new counsel, contended that his trial counsel rendered ineffective assistance. The court of appeals rejected this contention. The court observed that the primary basis of petitioner's Sixth Amendment claim was that counsel had failed to seek to introduce, pursuant to Fed. R. Evid. 804(b)(1),3/ the testimony given by Edgar at the suppression hearing.4/ The court concluded, however, that there was a "real question" whether the testimony given at the suppression hearing would have been admissible at trial under Rule 804(b)(1) and, accordingly, that counsel was not incompetent for failing to attempt to introduce it. Pet. App. 1-2. The court of appeals declined petitioner's invitation to change the "farce and mockery" formulation of the test of ineffective assistance of counsel utilized in the Second Circuit and to replace it with a standard of "reasonable competence" adhered to in other circuits. The court noted that its prior precedents utilizing the "farce and mockery" formulation could not be overruled without an en banc hearing, which seemed to the court

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3/ Fed. R. Crim. P. 804(b)(1) provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

4/ The court also concluded that trial counsel's failure to move for a judgment of acquittal under Fed. R. Crim. P. 29 did not constitute ineffective assistance of counsel. Pet. App. 2.

"inappropriate in this case" (Pet. App. 2). The court of appeals also rejected petitioner's contention that a supplemental charge to the jury violated his rights under Allen v. United States, 164 U.S. 492 (1896), and In re Winship, 397 U.S. 358 (1970).

ARGUMENT

1. Petitioner contends (Pet. 7-13) that the Court should grant certiorari to review the court of appeals' formulation of the standard for determining whether counsel's performance was constitutionally ineffective. Under the Second Circuit's formulation, counsel's performance is deemed ineffective if it rendered the trial a "farce and mockery of justice." Pet. App. 2, citing United States v. Aulet, 618 F.2d 182, 187 (2d Cir. 1980).

a. Petitioner is correct in asserting (Pet. 8) that the other courts of appeals no longer use the "farce and mockery" language. Rather, they describe the test as whether the attorney rendered reasonably competent assistance or assistance within the range of competence demanded of attorneys in criminal cases.5/ See also Engle v. Isaac, No. 80-1430 (April 5, 1982), slip op. 25; Cuyler v. Sullivan, 446 U.S. 335, 344 (1980); Tollett v. Henderson, 411 U.S. 258, 266-269 (1973); McMann v. Richardson, 397 U.S. 759, 770-771, 774 (1970).

The Second Circuit, then, is the only court of appeals that has not formally abandoned the "farce and mockery" language. However, as petitioner acknowledges (Pet. 8), even panels of that court, or individual members of such panels, have on numerous occasions indicated a willingness, in an appropriate case, to

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5/ Contrary to petitioner's contention (Pet. 8), the Tenth Circuit has abandoned the "farce and mockery" language. See Dyer v. Crisp, 613 F.2d 275, 278 (en banc), cert. denied, 445 U.S. 945 (1980). The general movement of the courts of appeals away from the "farce and mockery" language is described in our briefs in opposition in Decoster v. United States, No. 79-5187, at 8-10 n.8, and Altamirano v. United States, No. 80-6108, at 9-10.

reconsider use of that formulation. But these panels have found it unnecessary thus far to do so, generally finding in the circumstances of the particular case that counsel's performance would not have violated the reasonable competence standard utilized by other courts of appeals.6/ The panel below took a similar approach in declining petitioner's suggestion that the "farce and mockery" standard be changed, concluding that the necessary en banc review would be "inappropriate in this case." Pet. App. A1-A2. The panel's conclusion is understandable, for as we explain below, defense counsel's performance in this case likewise satisfied the formulation employed by other courts of appeals.

b. The principal ground for petitioner's argument that he received ineffective assistance of counsel at trial is that counsel did not seek to introduce the testimony given by petitioner's brother, Edgar, at the suppression hearing. See Pet. 11-12. Petitioner asserts that this testimony -- that the cocaine, equipment, and blue flight bag belonged to Edgar and that petitioner did not carry the flight bag into the apartment

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6/ See United States v. Helgeson, 669 F.2d 69, 71 (1982); United States v. Alessi, 638 F.2d 466, 477 (1980); Brinkley v. Lefevre, 621 F.2d 45, cert. denied, 449 U.S. 868 (1980); United States v. Aulet, 618 F.2d 182, 187 (1980); Twitty v. Smith, 614 F.2d 325, 333 & n.10 (1979); Bellavia v. Fogg, 613 F.2d 369, 374 (1979); Indiviglio v. United States, 612 F.2d 624, 629 n.8 (1979), cert. denied, 445 U.S. 933 (1980); id. at 632 (Mansfield, J., concurring); United States v. Menendez, 612 F.2d 51, 55 (1979); United States v. Taylor, 562 F.2d 1345, 1360, cert. denied, 432 U.S. 909 (1977); United States v. Medico, 557 F.2d 309, 318 n.15, cert. denied, 434 U.S. 986 (1977); Rickenbacker v. Warden, 550 F.2d 62, 66 (1976), cert. denied, 434 U.S. 826 (1977). See also Barnes v. Jones, 665 F.2d 427, 431 n.4 (2d Cir. 1981), cert. granted, No. 81-1794 (June 7, 1982).

(see page 3, supra) -- would have been admissible under Fed. R. Evid. 804(b)(1).7/

As an initial matter, we note that petitioner's ineffective assistance of counsel claim was not presented to the district court, either in a motion for a new trial or in a motion under 28 U.S.C. 2255, so there has not been an opportunity for a hearing or other factual inquiry into the reasons for counsel's failure to seek to introduce Edgar's suppression hearing testimony at trial. We believe that such a claim ordinarily should first be presented to the district court, so that, if the court deems it necessary,8/ such an inquiry and appropriate findings can be made regarding counsel's asserted failings and any prejudice resulting therefrom. See United States v. Lurz, 666 F.2d 69, 78 (4th Cir. 1981); United States v. Aulet, supra, 618 F.2d at 185-186; United States v. Schreiber, 599 F.2d 534, 538 (3d Cir.), cert. denied, 444 U.S. 1031 (1979).

In the present case, for example, it is possible that such an inquiry would establish that counsel's failure to seek to introduce Edgar's suppression hearing testimony resulted from a tactical assessment that Edgar's open admissions of his own drug dealings would not be likely, on balance, to advance petitioner's cause significantly or might actually harm the defense. This

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7/ Petitioner also appears to argue (Pet. 10-11) that counsel was incompetent in not calling Edgar and Lemos to testify at trial. But if Edgar and Lemos consulted with their attorneys, which, petitioner concedes (Pet. 10-11), the district court properly made a precondition to their testifying, the attorneys surely would have advised them to assert their Fifth Amendment privilege. It seems quite clear, then, that Edgar and Lemos would not have given testimony to exculpate petitioner, for that would have required them to incriminate themselves by asserting that the flight bag and the cocaine it contained, as well as the other cocaine and equipment found in the apartment, were theirs. Given this, counsel's failure to go through the formality of calling Edgar and Lemos, only to have them invoke their Fifth Amendment privilege at the critical point, surely was within the range of reasonable competence expected of defense counsel. Indeed, it may be that counsel already had ascertained by the time the defense rested that Edgar and Lemos would not testify.

8/ See Chambers v. Maroney, 399 U.S. 42, 54 (1970).

possibility is supported by the fact that petitioner testified on cross-examination at trial that Edgar had lived with him for eight months in 1979 and that he suspected that Edgar was involved in the sale of cocaine (7-28-81 Tr. 27, 40). Given petitioner's testimony, counsel reasonably could have concluded that it would not be wise to press for admission of Edgar's prior testimony, especially in view of Edgar's obvious incentive to lie at the suppression hearing in order to protect his brother. Even if a court might in retrospect disagree with counsel's assessment of the facts and risks, this does not render counsel's assistance constitutionally ineffective. Tollett v. Henderson, supra, 411 U.S. at 267; McMann v. Richardson, supra, 397 U.S. at 770-771.9/

Possible tactical considerations to one side, however, petitioner's claim of ineffective assistance of counsel is without merit even under a standard of "reasonable competence" because it does not appear that Edgar's suppression hearing testimony would have been admissible at trial under Fed. R. Evid. 804(b)(1) in any event. That rule provides that testimony given as a witness at another hearing is not excluded by the hearsay rule if the party against whom it is offered "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" in the prior proceeding. In the present case, the attorney for the government did not have a "similar motive" to develop Edgar's testimony regarding petitioner's involvement at the suppression hearing because the issues in that hearing were entirely different from those at trial. At the outset of the suppression hearing, the court stated that the issues to be determined were whether Edgar and Lemos consented

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9/ It also is possible, of course, that it did not occur to petitioner's attorney to attempt to introduce Edgar's suppression hearing testimony once he had determined not to call Edgar to testify. But as this Court only recently emphasized, the Sixth Amendment does not insure that counsel will recognize and pursue every possible claim in defense of his client. Engle v. Isaac, supra, slip op. 25.

to the agents' entry into their apartment and whether the agents had probable cause to enter to search for the fugitive (S. Tr. 4, 5). Throughout the proceedings the court repeatedly confined direct and cross examination to these issues (S. Tr. 58, 69, 67, 70, 71, 72, 73, 79, 140, 141, 181, 182, 183, 185, 188, 237, 238, 258). The guilt or innocence of the three defendants charged in the indictment, including petitioner, was not in issue, and the government therefore did not have a motive fully to test Edgar's assertions that the cocaine and blue flight bag belonged to him and that petitioner did not carry the flight bag into the apartment.

The Advisory Committee Note to Rule 804(b)(1) states in this regard that it was generally required at common law that in order for prior testimony to be admissible, the issues at the former and later proceedings had to be identical or substantially identical, "as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented." The Note then states that "[s]ince identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness," it was preferable to express the test of admissibility under Rule 804(b)(1) in terms of motive. Here, where the issues at the suppression hearing and trial were entirely different, the requisite "similar motive" for developing fully the testimony in question did not exist in the two proceedings.10/

10/ A suppression hearing differs in this respect from a preliminary hearing, the type of proceeding involved in a number of decisions of this Court concerning the admissibility of prior testimony under the Confrontation Clause. Ohio v. Roberts, 448 U.S. 56, 68-73 (1980); California v. Green, 399 U.S. 149, 165-168 (1980); Barber v. Page, 390 U.S. 719, 725-726 (1968); Pointer v. Texas, 380 U.S. 400, 407 (1965). A preliminary hearing involves an inquiry into the merits of the charge that will again be explored at the trial itself, although the government's burden of proof at the preliminary hearing is simply to establish probable cause, not guilt beyond a reasonable doubt. Barber v. Page, supra, 390 U.S. at 725.

Moreover, it is especially significant in the context of this case that the Second Circuit -- the court whose precedents controlled the conduct of petitioner's trial -- previously had ruled that the suppression hearing testimony of a co-defendant was not admissible on behalf of the defendant at trial because the issue at the hearing was not the guilt or innocence of the defendant. United States v. Wingate, 520 F.2d 309, 315-316 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976).11/ Given the Second Circuit's decision in Wingate, it would have been well within the range of competence ordinarily expected of attorneys in criminal cases for counsel to conclude that Edgar's suppression hearing testimony was inadmissible at trial. The court of appeals agreed when it affirmed petitioner's conviction, concluding, citing Wingate, that there was a "real question" whether Edgar's suppression hearing testimony would have been admissible at trial (Pet. App. 1-2).12/ Thus, whether the

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11/ The trial in Wingate occurred before Fed. R. Evid. 804(b)(1) became effective, but the Second Circuit nevertheless relied on that rule. 520 F.2d at 316. In the present case, the pertinent testimony by Edgar was given during the government's cross-examination of him at the suppression hearing. It does not appear that this was the case in Wingate. This does not significantly distinguish the two cases, however. In the present case, the government did not have a motive to "fully develop" the testimony relating to Edgar's involvement, as the Advisory Committee Note, quoted above, would seem to require, and the government did not in fact do so. Compare Ohio v. Roberts, supra, 448 U.S. at 70-71.

12/ Petitioner relies (Pet. 11) on three decisions from other circuits which, unlike Wingate, were not controlling precedent in the Second Circuit and therefore cannot serve as an appropriate measure of counsel's performance. In any event, the three decisions are readily distinguishable.

In United States v. Zurosky, 614 F.2d 779, 791-793 (1st Cir. 1980), the trial court had explicitly warned counsel that the suppression hearing witness's testimony might be admissible at trial under Fed. R. Evid. 804(b)(1), and the court accordingly invited cross-examination on the question of guilt or innocence. The First Circuit held that the repeated warnings of the trial court served to widen the scope of the suppression hearing to put guilt or innocence in issue, and it distinguished the Second Circuit's decision in Wingate on precisely this ground. 614 F.2d at 792-793. No such warnings or widening of the scope of the suppression hearing occurred here. In United States v. Curry, 471 F.2d 419 (5th Cir.), cert. denied, 411 U.S. 95 (1973), there was of course no discussion of the yet to be adopted Rule 804(b)(1). (continued)

inquiry into counsel's performance is pursued under the "farce and mockery" or "reasonable competence" rubric, it is clear that petitioner did not receive constitutionally ineffective assistance of counsel, in view of the prior application of Rule 804(b)(1) by the Second Circuit in Wingate.13/

c. Because there has been a general movement by the courts of appeals away from the "farce and mockery" formulation; because the

Moreover, because a portion of the declarant's suppression hearing testimony in fact was admitted at defendant's trial, the court of appeals simply concluded that the declarant's subsequent sworn statement partially repudiating that testimony should have been admitted as well. 471 F.2d at 421. The last appellate decision cited by petitioner, United States v. Thomas, 571 F.2d 285 (5th Cir. 1978), is wholly inapposite because it involved Rule 804(b)(3), not Rule 804(b)(1).

Petitioner, relying on this Court's decision in Chambers v. Mississippi, 410 U.S. 824 (1973), even goes so far as to assert (Pet. 11) that the Constitution would have mandated the admission of Edgar's suppression hearing testimony even if Rule 804(b)(1) would have barred it. The Second Circuit previously had rejected this argument in United States v. Wingate, supra, 520 F.2d at 316, and counsel's performance therefore cannot be thought to have been ineffective on this ground either. Moreover, here, as in Wingate, the suppression hearing testimony did not have indicia of reliability even approaching those of the testimony of the three persons to whom the individual in Chambers v. Mississippi assertedly had confessed. There, the declarant, unlike Edgar, was available at trial for cross-examination by the prosecution. 410 U.S. at 301. In addition, the declarant in Chambers made each of his three confessions spontaneously to a close acquaintance shortly after the crime, and there was independent corroboration of the declarant's statements by eyewitnesses. Id. at 300. Finally, although the Court stated in Chambers that the declarant stood to gain nothing by disclosing his role in the shooting (410 U.S. at 301), Edgar had a powerful incentive to assert that he alone was involved in drug dealing in order to exculpate his brother, especially since his suppression hearing testimony could not be admitted against him at trial. United States v. Salvucci, 448 U.S. 83, 89-90 (1980).

13/ Petitioner also suggests (Pet. 12-13) that counsel's assistance was ineffective because counsel: did not request a jury instruction regarding the weight to be given a police officer's testimony until after the court had completed its instructions, at which point it was denied; was uncertain until late in the trial whether he would call petitioner to testify; did not make a motion for a judgment of acquittal under Fed. R. Crim. P. 29; and conducted "less than stellar cross-examination." Petitioner concedes (Pet. 12, 13) that these are subsidiary points, and they warrant little attention here. Thus, petitioner acknowledges that whether to give the requested jury instruction would have been "in the discretion of the court" (Pet. 12); he fails to point to any prejudice resulting from counsel's uncertainty about whether petitioner would testify; he fails to explain why a Rule 29 motion would have succeeded; and he does not specify any particular shortcomings in counsel's cross-examination or identify what else could have been elicited.

Second Circuit itself has indicated that it would be prepared to reconsider that formulation in an appropriate case, but simply did not find this to be such a case; and because counsel's performance here satisfied either formulation in any event,[14] review by this Court is not warranted. We note as well that the Court recently granted certiorari in Jones v. Barnes, No. 81-1794, which concerns the standard by which appellate counsel's performance is to be judged. Petitioner apparently intends to argue in that case, inter alia, that the standard should be no different from that governing counsel's conduct at trial. See No. 81-1794 Pet. for Certiorari, at 7-8, 9-10. The Court therefore may have occasion in Jones v. Barnes to consider the appropriate formulation of a standard for effective assistance of counsel at trial as well. For this additional reason, review in the instant case is unwarranted, especially since Jones v. Barnes likewise involves review of a Second Circuit decision.

2. Petitioner's argument (Pet. 14-16) regarding the supplemental charge to the jury warrants little discussion. Petitioner failed to raise an objection to the charge at trial, and he therefore is barred from raising such an objection on appeal

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14/ It is not clear that the difference between the "farce and mockery" and "reasonable competence" standards is anything more than semantic. Even under a reasonable competence standard the defendant must prove "serious derelictions" on the part of counsel (McMann v. Richardson, supra, 397 U.S. at 774; see also our brief in opposition in Jennings v. United States, No. 81-6296, at 6-7), as well as prejudice (Chambers v. Maroney, supra, 399 U.S. at 54; see also our brief amicus curiae in Morris v. Slappy, No. 81-1095, at 9-11 & n.2), in order to establish a violation of the Sixth Amendment right to the effective assistance of counsel. The phrase "farce and mockery" largely serves to emphasize that there must be such a substantial departure from the range of competence ordinarily expected of defense counsel, and its application therefore probably affects the outcome in few, if any, cases. The Ninth and Tenth Circuits acknowledged this point when they abandoned the "farce and mockery" language, Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980) (en banc); Cooper v. Fitzharris, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 979 (1979), and Judge Leventhal similarly observed in United States v. Decoster, 624 F.2d 196, 206 (D.C. Cir.), cert. denied, 444 U.S. 944 (1979), that the differing formulations may be little more than a "semantic merry-go-round."

unless the charge constituted plain error. Fed. R. Crim. P. 30, 52(b). Clearly it did not.

Petitioner argues that the court "could have conveyed an erroneous impression" regarding the standard of proof in a criminal trial (Pet. 15) when it charged the jury that "[t]here is nothing peculiarly different in the way a jury should consider the evidence in a criminal case from that in which all reasonable persons treat any question depending upon evidence presented to them." 7-29-81 Tr. 5. This contention is frivolous. It is clear in context that the court was simply explaining the manner in which evidence is to be evaluated, not the government's burden of proof in a criminal case. Indeed, after reciting the sentence to which petitioner objects, the court stressed no fewer than six times in its supplemental charge that the evidence must establish guilt beyond a reasonable doubt. 7-29-81 Tr. 8, 9, 10, 11, 13, 14. In light of the trial court's subsequent admonitions and viewing the charge as a whole (see, e.g., United States v. Frady, No. 80-1595 (April 5, 1982), slip op. 17), the isolated passage upon which petitioner relies could not have conveyed the impression that a lesser showing of guilt would suffice.

Petitioner also contends (Pet. 15) that the court's statement that this was "not a complex case" and presented "a question of credibility and common sense" (7-29-81 Tr. 3, 4) had the effect of suggesting that the government's case was more plausible than petitioner's and therefore might have placed pressure on jurors leaning in favor of acquittal to vote instead to convict. This contention, too, is frivolous. Immediately after these statements, and after informing the jurors of their duty to deliberate with one another, the court stressed that each juror must decide the case for himself. The court then instructed the jurors: "[D]o not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict" (7-29-81 Tr. 5). The

isolated phrases cited by petitioner, especially when considered in light of this explicit charge, clearly were not coercive.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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